Cal-West Periodicals, Inc. and General Teamsters Union Local 439, International Brotherhood of Teamsters, AFL-CIO, Petitioner. Case 32–RC-4475

January 31, 2000

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS FOX, HURTGEN, AND BRAME

The National Labor Relations Board, by a threemember panel, has considered determinative challenges and objections to an election held on August 13, 1998, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 9 for and 7 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.¹

The Board has reviewed the record in light of the exceptions and brief, has adopted the Regional Director's findings and recommendations, and finds that a certification of representative should be issued.

We agree with the Regional Director that the two statements allegedly made by a nonagent employee supporter of the Union are not grounds for setting aside the election.²

Taking as true the affidavits submitted by the Employer, we accept the following as the relevant facts. About 8 days before the election, an employee accompanied by two fellow workers approached employee Philpott as the latter was sitting at a lunch table in the employee lunchroom. As the three stood around Philpott's table, within earshot of another employee, one of the three told Philpott that he had better vote "Yes" for the Union, and if he did not, he could just wait and see what happened to him. Philpott (but not the other listening employee, who says he left after the first statement) alleges that "they" then said that if he crossed a picket line, they would beat him up.

There are no allegations that there were any picket lines around the Employer's premises and no allegations of any incidents of violence or other threats during the campaign that might give meaning to the "wait and see" reference or immediacy to the picket line remark. With particular respect to the "wait and see" remark, we agree with the Regional Director that this ambiguous statement does not necessarily establish a threat of physical harm.

And, even if it did, the threat was by a nonagent and was not pervasive. And as noted above, the picket line reference had no context of immediacy.

Our colleague seeks to tie the first remark to the second one. However, the first one allegedly concerns the consequences of *not selecting* the Union; the second one allegedly concerns the consequences of *selecting* the Union, i.e., picket lines and the consequences of crossing them. In addition, even if the two statements are inextricably tied, only Philpott heard both remarks.

While this case is like Steak House Meat Co., 206 NLRB 28, 29 (1973), and Buedel Food Products Co., 300 NLRB 638 (1990), in that the alleged threat was made to a potentially determinative number of voters, the statements simply lack the same degree of specificity or likely coercive impact. In *Steak House*, the threats were of a particularly aggravated nature: a 16-year old employee was subjected to repeated threats, including—in one instance—the threat by a knife-wielding employee to kill the teen if he voted against the union. The Board found that these threats had the obvious aim of influencing the teen's vote, as evidenced by a second employee's subsequent rejuvenation of them by threatening to "get even" with the teen if the union lost the election. Here, the alleged threats lack the frequency and severity of those in Steak House, were not made immediately before the election, and were not directed at the employee's vote.³ This case is also unlike *Buedel*, where an employee was threatened that his car would be burned up. Nothing of that nature is alleged to have been said here.

With regard to the picket line reference in *Home & Industrial Disposal Service*, 266 NLRB 100 (1983), on which our colleague relies, we likewise find it distinguishable.⁴ In *Home & Industrial*, the threat was made by a union official, 1 hour before the election,⁵ and—significantly—was "punctuated by historical fact." Thus, when uttering the threat, the union agent stated that an employee who had refused to toe the line during the union's previous strike remained hospitalized. There are no similar references to, or evidence of, past or suspected future picketing here. Furthermore, we note that the Board in *Pony Express Courier Corp.*, 282 NLRB 265 (1986), limited the application of *Home & Industrial* to its facts, i.e., to instances in which statements about the

¹ In the original tally of ballots there were two challenged ballots, a determinative number. The Regional Director recommended sustaining the challenge to the ballot of Harjeet Dosanjh and finding that the remaining challenge was nondeterminative. No exceptions were filed to this recommendation and we have revised the tally accordingly.

² Contrary to our dissenting colleague, we also find that a hearing is not warranted because there are no substantial and material factual issues requiring resolution. On the contrary, for purposes of our analysis, we have treated the Employer's evidence as true.

³ Our dissenting colleague begrudgingly admits that the conduct here is "perhaps less severe" than in *Steak House*. We, however, find that it markedly differs in terms of the seriousness of the conduct, the frequency of its occurrence, and its proximity to the election.

⁴ Our colleague notes that the Board, in *Home & Industrial*, quoted from the Third Circuit's decision in *Hickory Springs*. (*Hickory Springs Mfg. Co. v. NLRB*, 645 F.2d 506, 510 (5th Cir. 1981).) However, that quote has to do with *pervasive* threats by a *union*. Neither factor is present here.

⁵ We are not suggesting that the conduct here was "too remote" in time to be objectionable. We simply note that timing is a factor and that the conduct here was further removed from the election than was the conduct in *Home & Industrial*.

consequences of crossing picket lines are made by agents of the union.⁶ Indeed, our colleague implicitly acknowledges that his view is not in accord with Board precedent, since he urges the overruling of *Pony Express*.⁷

The fact that the statements at issue in this case were made by employees who are not agents of the Petitioner Union has significance for how we view all the statements, not just the picket line statements. Thus, it is well settled that where the challenged conduct is committed by nonagent employees, it is evaluated under the thirdparty standard. Under this standard, the objecting party must establish that the third-party conduct during the election was so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible. Westwood Horizons Hotel, 270 NLRB 802, 803 (1984). Further "[c]ourts are hesitant to overturn elections when statements cannot be attributed to the union because 'there generally is less likelihood that they affected the outcome." NLRB v. Eskimo Radiator Mfg. Co., 688 F.2d 1315, 1319 (9th Cir. 1982), quoting NLRB v. Mike Yurosek & Sons, 597 F.2d 661, 663 (9th Cir.), cert. denied 444 U.S. 839 (1979). In addition, inasmuch as a union (or an employer) cannot control nonagents, there are equities that militate against taking away an election victory because of conduct by a nonagent. Our dissenting colleague repeatedly confuses cases involving union conduct with those involving nonunion (thirdparty) conduct. See, e.g., his reliance on Home & Industrial and Methodist Home. (Methodist Home v. NLRB, 596 F.2d 1173 (4th Cir. 1979).) The difference between the two cases is not only the difference in standards, but also the fact that employees reasonably have a greater concern about threats emanating from the union that may become their exclusive representative than they would have from threats uttered by a single-nonagent individ-

As for the hostile character of the alleged remarks, as one court has noted: "A certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election." *Nabisco, Inc. v. NLRB*, 738 F.2d 955, 957 (8th Cir. 1984) (upholding the Board's overruling of objections based on anonymous stoning of antiunion employee's house and statement by anonymous union supporter to employee that "your name is

being mentioned by everyone on the street, and your coworkers aren't going to be the same with you as before"). See also *NLRB v. Hood Furniture Mfg.*, 941 F.2d 325 (5th Cir. 1991). (In election decided by one vote, the Board properly overruled, without evidentiary hearing, various employer objections including one based on incident in which unidentified prounion handbiller reacted to employee's refusal to take leaflet by calling him an obscene name, telling him he'd "better vote 'Yes'" and swatting his car with the leaflets.) We simply cannot find that a single conversation of the kind alleged here is sufficient to require that the election be set aside.⁸

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for General Teamsters Union Local 439, International Brotherhood of Teamsters, AFL—CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time drivers employed by the Employer at its Stockton, California facility; excluding office clerical employees, guards, and supervisors as defined in the Act.

MEMBER BRAME, dissenting.

I strenuously disagree with my colleagues' adoption of the Regional Director's report, which recommends summarily overruling the Employer's objection to conduct affecting the results of an election. The Employer has presented evidence that clearly justifies sending the objection to hearing.

An election was conducted among employees in the stipulated unit on August 13, 1998.¹ The tally showed nine valid ballots cast for, and seven against, the Petitioner.² Accordingly, a shift in a single vote could have changed the outcome.

The Employer's objection alleged that the election should be set aside because of threats of physical violence or damage to personal property made to bargaining unit employees during the critical period following the

⁶ In addition, it is most unlikely that the "picket line" statement would coerce Philpott into voting *for* the Union. If anything, it would seem that this statement would prompt him to vote against the Union so as to avoid the prospect of a union picket line and the crossing thereof.

⁷ In *Pony Express*, the Board held that the alleged threats by three employees of future injury to their coworkers did not interfere with the election. In reaching this conclusion, the Board relied, inter alia, on the facts that the three employees were "not agents of the Petitioner, [] the objected-to threats were not directed to soliciting or influencing employees to vote for the Union, and the threats were not made against a backdrop of an actual incident of physical injury or damage to property or followed by an act of violence." The Board also relied on the fact that the alleged threats occurred several weeks before the election and were not thereafter repeated.

⁸ Zieglers Refuse Collectors v. NLRB, 639 F.2d 1000 (3d Cir. 1981), on which our dissenting colleague relies, is distinguishable. In that case there were five separate incidents, including two in which employees threatened to "kick" the "ass" of any employee who failed to support the union; and several of the threats were made by a 250-pound 6' 7" ex-Marine to a much smaller employee. The court relied on the number of threats, their wide dissemination, the fact that two of the threats were made the day before the election, and a background of "rumors of other incidents of physical coercion." Id. at 1009. No such circumstances are present here. In NLRB v. Custom Display Studios, 590 F.2d 637 (6th Cir. 1978), also relied on by our colleague, the coercive incidents consisted of throwing nails on a driveway into the plant and a specific threat to use physical violence against an employee if he did not support the union.

¹ All dates are in 1998.

² There were no void ballots and two challenged ballots. The Employer did not except to the Regional Director's recommendation to sustain one challenge, thereby rendering the remaining challenge non-determinative.

filing of the representation petition on June 22. In support of the objection, the Employer provided sworn statements from two witnesses, both members of the proposed bargaining unit. Employee Philpott testified that on August 5, 1998, about a week before the election, three known employee supporters of the Union approached him while he was eating alone in the company lunchroom. They asked him why he was against the Union. According to Philpott, the three employees moved closer to the table where he was sitting and "said that I better vote 'Yes' for the Union and that if I did not, just wait and see what happens to me." Philpott further declared that the employees "also said that if I crossed a picket line, that they would beat me up." Philpott stated that when he returned home, he noticed that union stickers had been affixed to his vehicle.

The second witness, employee Ceja, testified that, on August 5, he saw three known employee supporters of the Union "surround Scott Philpott," and that he "heard one of the employees tell Scott Philpott that he better vote 'Yes' for the Union and that if he did not, just wait and see what happens to him." Ceja stated that, at this point, he left the lunchroom.

Failure to require a hearing in this case, as my colleagues implicitly acknowledge, is to find that, even accepting the Employer's evidence as true, there is no justification for setting aside the election. Neither the evidence proffered, sound legal reasoning, nor case precedent can support such a conclusion. I would find that the Employer has made out a prima facie case sufficient to require a hearing. See, e.g., *Hickory Springs Mfg. Co. v. NLRB*, 645 F.2d 506, 508 (5th Cir. 1981) ("[W]hen an objector . . makes out a prima facie case by its affidavits the Board must grant a hearing"); *NLRB v. Eskimo Radiator Mfg. Co.*, 688 F.2d 1315, 1317 (9th Cir. 1982); *Methodist Home v. NLRB*, 596 F.2d 1173, 1178 (4th Cir. 1979), supplemental decision, 253 NLRB 458 (1980), enfd. 672 F.2d 911 (4th Cir. 1981).

In the first of the two statements alleged as objectionable, employee Philpott was warned that, if he did not vote for the Union, he should wait and see what would happen to him. My colleagues argue that the Employer has made "no allegations of any incidents of violence or other threats during the campaign that might give meaning to the 'wait and see' reference" and that the statements "lack the same degree of specificity or likely coercive impact" as those found objectionable in *Steak House Meat Co.*, 206 NLRB 28 (1973), and *Buedel Food Products Co.*, 300 NLRB 638 (1990).

However, in the very same "discussion" in which the "wait and see" statement was made, Philpott was threatened with physical violence when told that he would be "beaten up" if he crossed a picket line. The "wait and see" statement made here by one of three prounion employees crowding around a lone antiunion worker in a lunchroom, and followed up with an unequivocal threat

of future physical violence, is not so without meaning and lacking in specificity as to support a decision to deny a hearing on the issue of whether the election results in this case reflected employees' free choice of a representative. "[T]he test to be applied is whether a remark can reasonably be interpreted by an employee as a threat." Smithers Tire, 308 NLRB 72 (1992). Here, an employee told that he had better vote "Yes" for the Union and that if he did not, he should "wait and see what happens to [him]" would certainly be reasonable in interpreting the statement as a threat. When that statement is followed by the statement that the employee would be beaten up if he crossed a picket line,³ it clearly can reasonably and objectively be interpreted as a threat. See, e.g., Picoma Industries, 296 NLRB 498, 499 (1989) ("[T]he test [for objectionable conduct is based on an objective standard"). My colleagues' implications that the "wait and see" statement was without meaning, nonspecific, and without coercive impact are not persuasive.

In attempting to minimize the "wait and see" statement, my colleagues assert that the Steak House and Buedel decisions are distinguishable. In Steak House, the representation election involved a small unit of approximately eight eligible voters, with the tally of ballots showing four votes for, and three against, the petitioner. 206 NLRB at 28. Two weeks before the election, one employee, Monge, threatened to kill another, Alexander, while brandishing a knife. A week later, Monge told the employee that he would get back at him if he voted against the Union. Id. A few days before the election, another employee, McCarty, said that he would get even with Alexander if the union lost the election. Id. at 28-29. The Board set aside the election, finding that "the character of the conduct was so aggravated as to create an atmosphere of fear and reprisal rendering a free expression of choice of representatives impossible." Id. at

³ In analyzing the alleged threats in this case, it is important to consider them together along with the surrounding circumstances. As the Eighth Circuit has explained, "[E]ven where an incident of misconduct, not insubstantial in nature, is insufficient by itself to show that an election was not an expression of free choice, two or more such incidents, when considered together in the totality of the circumstances, may be deemed sufficient to support such a conclusion." NLRB v. Monark Boat Co., 713 F.2d 355, 360 (8th Cir. 1983) (quoting Bauer Welding & Metal Fabricators, Inc. v. NLRB, 676 F.2d 314, 318 (8th Cir. 1982)), supplemental decision, 276 NLRB 1143 (1985), enfd. 800 F.2d 191 (8th Cir. 1986). See also NLRB v. McCarty Farms, Inc., 24 F.3d 725, 728 (5th Cir. 1994) ("We must review all of the events in their totality in making our determination"); NLRB v. L & J Equipment Co., 745 F.2d 224, 238 (3d Cir. 1984) (quoting Bauer Welding, 676 F.2d at 318), rehearing denied 750 F.2d 25 (3d Cir. 1984), vacated 274 NLRB 20 (1985), remanded 278 NLRB 485 (1986); and Picoma Industries, 296

My colleagues discount the importance of considering the two alleged threats together. The above cases, however, make clear that this is the correct approach. Similarly, my colleagues' attempt to devalue the effect of the two alleged threats by noting that only Philpott heard both statements is also meritless. As explained in more detail infra, the election results in this case were so close that a change in a single employee's vote could have altered the outcome.

29. Although they acknowledge that the present case, like *Steak House*, involves threats made to a potentially determinative number of voters, my colleagues attempt to distinguish *Steak House* on the grounds that the threats in the present case "lack the frequency and severity" of the *Steak House* threats, "were not made immediately before the election, and were not directed at the employee's vote."

This attempt to distinguish Steak House is not persuasive. As in Steak House, the present case involves a very small bargaining unit and an extremely close election—a change of one vote could alter the outcome of the election. Although the threats in the present case did not occur with the same degree of frequency and were perhaps less severe than those in Steak House, at least one of the threats in the present case was heard by at least one other bargaining unit employee and therefore could have affected more than one vote, unlike those in Steak House. Additionally, there is nothing in Steak House to suggest that the conduct therein was the bare minimum that could support a finding of coercive conduct sufficient to require the setting aside of an election. My colleagues' assertion that the threats in the present case did not come "immediately before the election" also does not distinguish Steak House. The threats in that case occurred 2 weeks, 1 week, and a few days prior to the election. Here, the threats occurred approximately 1 week before the election. This is not a sufficient ground for distinguishing the two cases. Finally, my colleagues' assertion that the threats in the present case "were not directed at the employee's vote" is simply false. A reasonable interpretation of the threats involved here is that Philpott would be harmed if he did not vote for the Union. The three prounion employees who surrounded him in the lunchroom told him that he must "wait and see" what would happen to him if he did not vote "yes" for the Union and then told him that they would beat him up if he crossed a picket line. Clearly, a reasonable interpretation of these statements is that they were "directed" at Philpott's vote in the upcoming election.

My colleagues also attempt ineffectively to distinguish *Buedel*. In that case, the Board found objectionable a third-party threat to burn an employee's car. The threat was delivered 1 to 2 weeks prior to the election and was disseminated to one other employee. 300 NLRB at 639 (Member Devaney, dissenting). In attempting to distinguish the case, my colleagues simply state: "This case is also unlike *Buedel*, where an employee was threatened that his car would be burned up. Nothing of that nature is alleged to have been said here." Surely, the statements that Philpott would have to "wait and see" what would happen to him if he did not vote "Yes" and that he would be *beaten up* if he crossed a picket line are at least as egregious as a threat to burn a car.

My colleagues also assert, in reference to the threat to beat up Philpott if he crossed a picket line, that the Employer has not alleged that there actually was a picket line or that there were "any incidents of violence or other threats" that would give "immediacy to the picket line remark." Initially, I must point out that current precedent establishes that threats of this type that relate to the possibility of future violence can certainly be objectionable even without the presence of a current picket line. Additionally, the statement that Philpott would have to "wait and see" what would happen to him if he did not vote "Yes" would seem to fall into the category of "other threats" that might bring "immediacy" to the picket line statement, if indeed such an additional threat is even necessary.

My colleagues' concern with the lack of "immediacy" of the picket line statement hearkens back to a former position of the Board that has since been repudiated. In *Hickory Springs Mfg. Co.*, a representation proceeding involving election objections, the Board considered union-uttered or sanctioned threats of violence against employees if they crossed a picket line, as well as threats of damage to company property, in the event of a strike. The Board found nothing objectionable:

If the Union here had threatened violence against employees for voting against it, we would, of course, have set this election aside. However, the evidence adduced by the Employer . . . shows that prounion employees, in the presence of a union agent, threatened employees with violence if the employees crossed a picket line of the Union. Inasmuch as there was no picket line then in existence, nor was one imminent, the so-called threats were thus conditioned on the Union winning the election, the contract negotiations with the Union failing, the Union calling a strike, and some employees opting not to honor the picket line. With these contingencies standing between the threats and their possible execution, we perceive little if any likelihood of the statements having any immediate coercive impact on the employees and the election results. [239 NLRB at 642.]

Although my colleagues do not explicitly state that the statement in the present case was "conditioned" on future events or that it relied on "contingencies," their assertions that there was no current picket line and that the picket-line statement had no "immediacy" suggest the same reasoning of that employed by the Board in *Hick-ory Springs*. The Fifth Circuit in that case, however, reversed the Board on appeal:

Men judge what others will do on given occasions by their prior actions and, less reliably, doubtless, by their statements about their intended future actions. So they assess what kind of folk they are dealing with and how

⁴ 239 NLRB 641 (1978), affd. in summary judgment proceeding 247 NLRB 1208 (198), enf. denied 645 F.2d 506 (5th Cir. 1981).

those folk are likely to react if crossed. Even the implicit threat of a club or pistol on the hip, without more, may be sufficient to influence significantly the conduct of those who are cast in company with the bearer. In short, we reject the view that such pervasive threats of violence as these can be said, in effect as a matter of law, not to have created a coercive atmosphere sufficient to contaminate the election because they were merely conditional ones. [645 F.2d at 510, emphasis added.]

Less than 2 years after the Fifth Circuit's decision, the Board overruled its decision in *Hickory Springs*⁵ in *Home* & Industrial Disposal Service, 266 NLRB 100, 101 (1983). My colleagues attempt to distinguish Home & Industrial from the present case. In Home & Industrial, the evidence offered was that a union agent threatened employees an hour before the election that if anyone assisted the company in a strike, that person would be "made an example of" and added that an individual who "worked both sides of the fence" during the last strike was "still in the hospital." Id. at 100. The Board found that if these allegations were true, the conditions for a free and fair election would have been destroyed, and thus ordered a hearing on the issue. Id. at 102. In attempting to distinguish Home & Industrial, my colleagues make much of the fact that in that case the threat referred to a historical incident of violence in a previous strike. The implication of this alleged distinction is that threats not related to earlier events cannot form a basis for objectionable conduct. To state the proposition is to recognize its absurdity. Nevertheless, I direct my colleagues' attention to the Board's decision in Hickory Springs, overruled by Home & Industrial, in which, as described, the threats related solely to contingent future

My colleagues go on to rely on *Pony Express Courier Corp.*, 282 NLRB 265 (1986), a case which is irreconcilable with *Home & Industrial* and which therefore should be overruled. In *Pony Express*, threats of physical vio-

lence in the event of a strike were made or disseminated by three employees to several others in a unit of fewer than twenty. Id. at 265-266 (Chairman Dotson, dissenting). As my colleagues note, the majority distinguished Home & Industrial on the basis that the employees uttering the threats were "not agents of the Petitioner . . . the objected to threats were not directed to soliciting or influencing employees to vote for the Union, and . . . the threats were not made against a backdrop of an actual incident of physical injury or damage to property or followed by an actual act of violence."6 Id. at 265. The first alleged distinction based on agency relates to the standard to be applied to the conduct at issue, but is not a reason to discount completely that conduct. This agency issue, on which my colleagues rest much of their reasoning, is considered in more detail below. The second alleged distinction is not even a difference, much less a distinction, since the threats in Home & Industrial were couched strictly in terms of conduct that would occur during a future strike.⁷ The third alleged distinction also fails, unless my colleagues intend to signify that threats unaccompanied by actual acts of violence are unobjectionable, in which case their decision and Pony Express are inconsistent with the overruling of *Hickory Springs*, which involved threats alone.8

Despite these inherent problems with *Pony Express*, my colleagues rely on it for the assertion that the Board has limited *Home & Industrial* "to its facts, i.e., to instances in which statements about the consequences of

⁵ Despite the clear overruling of *Hickory Springs*, my colleagues continue to use reasoning employed in that decision. In addition to their insistence that the threat in the instant case was not "immediate" enough, my colleagues also assert that the picket-line statement was unlikely to coerce Philpott into voting for the Union and instead "would prompt him to vote against the Union so as to avoid the prospect of a Union picket line and the crossing thereof." This language certainly recalls the similar language employed in the since overruled Hickory Springs: "[W]e believe that the immediate effect of the Union's conduct [in threatening violence in the event that employees crossed picket lines in the future], if any, would be to cause employees to be repelled by it and to vote against it." 239 NLRB at 642. This type of reasoning is even more inappropriate in the present case, where the prounion employees not only threatened violence in the event of a future strike, but also told the antiunion employee that he would have to "wait and see" what would happen to him if he failed to vote "Yes" in the upcoming election. Certainly, in this present situation, the employee could be expected to connect the two statements and feel coerced into voting for the Union.

⁶ As my colleagues also note briefly, *Pony Express* did provide a fourth alleged distinction: that the threats were uttered "several weeks" before the election and not repeated. This clearly is not a distinction with merit. The Board considers all misconduct occurring during the "critical period" between the filing of the petition and the election. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278 (1961). The Sixth Circuit has also quite clearly rejected this type of argument based on the timing of physical threats. In *NLRB v. Custom Display Studios*, the court rejected the Board's argument that two incidents of misconduct, having occurred 2 months before an election, did not warrant nullifying the result: "Common sense teaches that threats of physical violence do not subside in only two months." 590 F.2d 637, 639 (6th Cir. 1978); see also *Buedel*, 300 NLRB at 639 (Member Devaney, dissenting) (1-to 2-week gap between objectionable conduct and election).

⁷ Indeed, in *Home & Industrial*, 266 NLRB at 100, the Board quoted and rejected the *Hickory Springs* rationale that "[n]one of the above statements allegedly made or adopted by the union officials involves any threat, or even hint of threat, towards employees based on how they would vote in the upcoming election."

⁸ If my colleagues do intend to endorse the position that "threats alone" are insufficient to set aside an election, at least where the threats involve physical instead of economic coercion, we shall be in for severe scrutiny from courts of appeals. In an analogous area of law, following criticism from the courts, the Board abandoned its rule that "absent violence," a striker could not be denied reinstatement for "making abusive threats against nonstrikers." *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985). The Board said in *Clear Pine*, "[W]e reject the per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts" and stated that "an employer need not 'countenance conduct that amounts to intimidation and threats of bodily harm." Id. (quoting *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977).)

crossing picket lines are made by agents of the union." Pony Express, however, even if good law, did not so limit Home & Industrial. Furthermore, Pony Express can be distinguished from the instant case. Contrary to my colleagues' assertions, Pony Express did not limit Home & Industrial's holding to situations in which the threats of future violence are made by union agents. That was just one of several factors that influenced the Board's decision in that case. In the instant case, there are other factors that should influence the Board's decision. First, the threat of future physical violence made here was made in conjunction with the "wait and see" threat, which related directly to Philpott's vote. Thus, the threat of future violence here, unlike those at issue in Pony Express, could reasonably be interpreted as an attempt to influence Philpott's vote. Second, the threats made here occurred just eight days prior to the election, as opposed to several weeks. Finally, the instant case involved a very close election⁹—even if Philpott's was the only vote possibly affected by the statements, 10 that vote alone could change the election result.¹¹

Despite these factors that indicate that the Employer has made out a prima facie case requiring a hearing, my colleagues focus the majority of their reasoning on the fact that the statements in the present case were not made by agents of the Union. In emphasizing this one factor so strongly, my colleagues' reasoning is misplaced. The issue in the present case is the effect that the prounion employees' statements had on a free election; thus, agency is relevant only in determining the standard against which the allegedly objectionable conduct is to be judged. As the Board and the courts have often recognized, the measure for third-party or nonagent behavior like that alleged here is whether the misconduct created "a general atmosphere of fear and reprisal rendering a free election impossible." Westwood Horizons Hotel, 270 NLRB 802, 803 (1984). See also Hickman Harbor Service v. NLRB, 739 F.2d 214, 220 (6th Cir. 1984); NLRB v. Monark Boat Co., 713 F.2d 355, 357 (8th Cir. 1983), supplemental decision 276 NLRB 1143 (1985), enfd. 800 F.2d 191 (8th Cir. 1986); Eskimo Radiator, 688 F.2d at 1319; Methodist Home, 596 F.2d at 1183. On the other hand, when conduct is attributable to a party, whether union or employer, "the proper test is whether the 'conduct reasonably tends to interfere with the employees' free and uncoerced choice in the election.'" *Pepsi-Cola Bottling Co. of Los Angeles*, 289 NLRB 736 (1988) (quoting *Baja's Place, Inc.*, 268 NLRB 868 (1984)). As explained by the Third Circuit:

The Board and the courts have acknowledged that even though the threats made were not attributable to the union, an election will nevertheless be set aside where the conduct created a general atmosphere inimical to the employees' exercise of a free and fair choice. The only distinction recognized in the statement of this standard is that less weight is accorded to conduct of third parties . . . than to the conduct of the employer and the union. ¹²

Zeiglers Refuse Collectors v. NLRB, 639 F.2d 1000, 1007 (3d Cir. 1981).

Under the correct standard for judging nonagent or third-party conduct, the Employer here has made out a prima facie case requiring a hearing on the issue. Assuming that the circumstances presented by the Employer are accurate, the prounion employees created an atmosphere of fear and reprisal that rendered a free election impossible. In reaching this conclusion, I consider, in addition to the issues already discussed, the small size of the bargaining unit and the closeness of the election results.¹³ As explained, the present case involves a bargaining unit of approximately 18 eligible voters and an election in which a change in one vote could have altered the results. In these circumstances, the alleged threats to Philpott, one of which was overheard by a second employee, created an atmosphere of fear and reprisal making a free election impossible.

The Board and the courts have consistently found that a close election and a small bargaining unit are factors requiring closer scrutiny of alleged misconduct. See, e.g., *Methodist Home*, 596 F.2d at 1184; *NLRB v. Custom Display Studios.*, 590 F.2d 637, 639 (6th Cir. 1978); *Picoma Industries*, 296 NLRB at 500. In *John M. Horn Lumber Co. v. NLRB*, for example, the court found an election unfair whether the perpetrators of the misconduct were union agents or not. 859 F.2d 1242, 1245 fn. 1

⁹ Although *Pony Express* involved a relatively close election, a change in three votes was necessary in that case to alter the outcome of the election. 282 NLRB at 266 (Chairman Dotson, dissenting). In the instant case, however, a change in just one vote could have altered the outcome.

¹⁰ It must also be noted here that the vote of another employee, Ceja, may also have been affected. As explained supra, Ceja witnessed the first half of the "discussion" between Philpott and the prounion employees and could reasonably have been influenced by seeing three prounion employees surround the antiunion Philpott and tell him that he would have to "wait and see" what would happen to him if he did not vote "yes" in the election.

¹¹ The importance of this factor—the closeness of the election—is discussed in more detail infra.

¹² Similarly, the Sixth Circuit has opined: "[W]e do not find the question of union responsibility and participation to be the ultimate determinative in situations where an atmosphere of fear and coercion are manifest." *Hickman Harbor*, 739 F.2d at 220. And the Fifth Circuit has commented: "We are not impressed with the argument that all coercive acts must be shown to be attributable to the union itself, rather than to the rank and file of its supporters. As the Board has once said, 'the important fact is that such conditions existed and that a free election is hereby rendered impossible." *Home Town Foods v. NLRB*, 379 F.2d 241, 244 (5th Cir. 1967) (quoting *Diamond State Poultry Co.*, 107 NLRB 3, 6 (1953)), supplemental decision 172 NLRB 1242 (1968), enf. denied 416 F.2d 392 (5th Cir. 1969). Accord: *Methodist Home*, 596 F.2d at 1183

¹³ For an explanation of the importance of considering the alleged misconduct cumulatively in connection with the surrounding circumstances, see fn. 3, supra.

(6th Cir. 1988). The court specifically noted that it had "repeatedly emphasized the intensified effect of threats" and violence in a small unit, particularly where the election results are close." Id. at 1244. The court specifically faulted the hearing officer and the Board for "fail[ing] to give adequate consideration to the small size of the unit involved and the closeness of the election." Id. Similarly, my colleagues here fail to give these factors the weight they require. In the instant case, three prounion employees surrounded employee Philpott and delivered two threatening statements, one of which was overheard by a second employee. One of the threats was clearly tied to Philpott's vote, and the other explicitly threatened physical violence. A change in one vote could have altered the outcome of this election, which occurred in a very small bargaining unit. As the Sixth Circuit has said, "[A] close election is a factor which demands that even minor infractions be scrutinized carefully." Custom Display, 590 F.2d at 639; see also NLRB v. Hood Furniture Mfg. Co., 941 F.2d 325, 332 (5th Cir. 1991) ("We recognize that in close vote election situations the Board is required to scrutinize charges particularly carefully which in other elections would constitute immaterial or insubstantial objections."), rehearing denied 946 F.2d 893 (5th Cir. 1991).¹⁴ Certainly, here, when "scrutinized carefully," these alleged threats are enough to support a finding that the Employer has made out a prima facie case that there was an atmosphere of fear and reprisal that rendered a free and fair election impossible.

Similarly, in Smithers Tire, the Board found that the conduct of nonagent employees could have affected the vote of the employee at which it was aimed and therefore, because a change in her vote and that of a separately threatened employee would have been enough to change the outcome of the election, the election had to be set aside.¹⁵ 308 NLRB at 73. There, two employees threatened to flatten the tires of a third employee's car if she voted against the union and told her that others would know how she voted. Id. at 72. Only one employee heard the statements, and there was no evidence that they were disseminated among the bargaining unit of 123 eligible voters. Id. at 73. Because the employee's vote, combined with that of another threatened employee, could have affected the election's outcome, however, the Board found these facts immaterial. As the Board noted, "The threats were obviously intended to influence [the employee's] vote and the threats intimated a substantial harm." Id. Similarly, in the instant case, the statements made to Philpott were clearly meant to influence his vote in that he was told to "wait and see" what would happen to him if he did not vote "yes," a statement that was followed immediately by a threat of physical harm. Additionally, the threat to "beat up" Philpott clearly "intimated a substantial harm." Moreover, unlike in Smithers, a second employee heard at least one of these threats.

The facts in this case, if established after a hearing, amply warrant setting aside the election due to the atmosphere of fear and reprisal created by the alleged threatening statements. My colleagues' failure to order such a hearing indicates to me a disagreement *sub silentio* with Board and court precedent outlined above.

¹⁴ The *Hood Furniture* court upheld the Board's denial of a hearing on the employer's objections to the election. The facts of that case are, however, distinguishable from those of the present one. The allegedly threatening conduct in Hood Furniture consisted of one incident in which an employee "was approached by an unidentified handbiller" in the employer's visitor parking lot. 941 F.2d at 329. "When [the employee] politely declined the literature, the handbiller called him a 'white mother fucker,' and, according to [the employee's] passenger, added that [the employee] had better vote 'yes.'" Id. The handbiller proceeded to swat the employee's car with his leaflets. The employer did not submit evidence regarding the handbiller's identity, and the employee stated that the incident did not affect his vote. Id. The court agreed with the hearing officer that the alleged threat was "isolated and de minimus,' with no evidence showing that it was widely disseminated or created an atmosphere of fear or reprisals." Id. Conversely, in the present case an employee in a significantly smaller bargaining unit (18 compared to the over 200 in *Hood Furniture*) was approached by three identifiable prounion employees, surrounded, told that he would have to "wait and see" what would happen to him if he voted against the Union, and then threatened with physical harm.

¹⁵ Smithers involved two separate allegations of threatening conduct. The other incident involved conduct by union agents and is thus less relevant to the instant case. In Smithers, it was necessary for the Board to find both incidents objectionable because, in order for the election results to be affected, it was necessary to find that at least two employees' votes could have been affected.